2623.

SUPREME COURT OF THE UNITED STATES.

No. 190.

WM. H. VAN BUREN, PLAINTIFF IN ERROR,

vs.

WM. H. DIGGES, USE OF JOSEPH LIBBEY.

IN ERROR TO THE CIRCUIT COURT, U. S., FOR WASHINGTON, D. C.

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GIDEON, Printer.

Writ of error.

THE UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the judges of the circuit court of the United States, sitting for the county of Washington, in the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you or some of you, between William H. Digges, plaintiff, and William H. Van Buren, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to be holden at Washington on the first Monday of December next, in said Supreme Court to be then and there had and held, and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, which of right and according to the laws and custom of the United States should be done.

Witness the hon. Roger B. Taney, chief justice of the said Supreme Court.

Issued this 6th day of April, 1849.

JOHN A. SMITH,
Clk. C. C., Washington city, D. C.

Citation.

DISTRICT OF COLUMBIA, *ss.*

The United States of America, to William H. Digges, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, sitting for the county of Washington, in the District of Columbia, wherein William H. Van Buren is plaintiff in error, and you are defendant in error, to shew cause, if any there be, why judgment rendered against the said William H. Van Buren, in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the hon. W. Cranch, chief judge of the said circuit court of the District of Columbia, the 6th day of April, 1849.

W. CRANCH.

Service acknowledged, 19th Sept., 1849.

JOS. H. BRADLEY,
Plaintiff's attorney.

Copy of appeal bond.

Know all men by these presents, that we, Thomas Lawson, T. P. Andrews, and H. C. Heiskell, are held and firmly bound unto William H. Digges in the full and just sum of three thousand dollars, current money of the United States, to be paid to the said William H. Digges, his certain attorney, executors, administrators, and assigns; to which payment, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents; sealed with our seals and dated this fifth day of April, eighteen hundred and forty-nine.

Whereas lately, in a circuit court of the District of Columbia, sitting for the county of Washington, in a suit pending in the said court, wherein the said William H. Digges was plaintiff, and the said William H. Van Buren was defendant, judgment was rendered against the said defendant, and he having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said William H. Digges, citing and admonishing him to be and appear at a Supreme Court, to be holden at Washington, on the first Monday of December next:

Now, the condition of the above obligation is such, that if the said William H. Van Buren shall prosecute his writ with effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be null and void, otherwise to be and remain in full force and virtue.

TH. LAWSON, [SEAL.]
T. P. ANDREWS, [SEAL.]
H. L. HEISKELL. [SEAL.]

Signed, sealed, and delivered in the presence of—
H. MAY,
RICH'D H. COOLIDGE.

Approved, April 6, 1849. W. CRANCH.
A true copy. Test: JNO. A. SMITH, *Clerk.*

Style of court.

DISTRICT OF COLUMBIA, *to wit:*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the fourth Monday of March, being the twenty-second day of the same month, in the year of our Lord one thousand eight hundred and forty-seven, and of the independence of the United States the seventy-first.

Present, the honorable William Cranch, chief judge; James S. Morsell, James Dunlop, assistant judges. Alexander Hunter, esq., marshal. William Brent, clerk.

In the records of the proceedings of the said court, amongst others were the following, to wit:

Parties.

WILLIAM H. DIGGES, use of Joseph Libby,
vs.
WILLIAM H. VAN BUREN.

Be it remembered, that heretofore, to wit, on the twenty-sixth day of June, in the year of our Lord one thousand eight hundred and forty-five, the said plaintiff, by Joseph H. Bradley, esq., his attorney, under and by virtue of the act of Congress of the United States, entitled "An act to secure to mechanics and others payment for labor done and materials furnished in the erection of buildings in the District of Columbia," filed with the clerk of the said court the following account, to wit:

Account.

DR.—William H. Van Buren to William H. Digges.

1845, April 21.

To the price of the contract for building, &c., on lots 11 and 12, in square 169 - - - - -	$4,600 00
To the addition thereto, and alteration in the plan thereof, as per agreement of 1st September, 1844 - -	525 00
To additional extra work required by you to be done on said building, not specified in said contract, or the additional agreement aforesaid, viz:	
Paid bricklayers for extra work - - - -	101 71
Removing fence - - - - - -	7 00
Grading the yard - - - - - -	12 00
Window in the gable end of main house - - -	25 00
2 closets in the office - - - - -	14 00
2 do dining room - - - - -	15 00
Snow breakers on the roof - - - -	6 00
Cutting three holes in parlor floor for furnace - -	1 50
Cutting ⩒ window in gable end - - - -	2 50
Fixing sliding door in closet between dining room and kitchen - - - - - -	20 00
Shelf connecting cases in the office - - - -	6 50
Carried forward,	
To amount brought forward,	$
To extra additional size of closet in office - - -	6 50
To two course brick additional height of 3d story - -	11 50
To plastering the additional height - - -	3 64
To extra width of 3 frames back of the house - -	21 00
	$5,376 85

Cr.

To William Brent, esq., clerk circuit court, &c.

Sir: You will please to file the above account and the following claim among the lien records of your office, to wit:

Know all men, that I, William H. Digges, of the county of Washington and District of Columbia, under a certain contract entered into by me with Dr. William H. Van Buren, of the said county, bearing date the 7th day of August, 1844; and a certain article of agreement additional thereto between the same parties, and bearing date the 1st day of September, 1844, did erect for the said William H. Van Buren, on lots numbered 11 and 12, in square numbered one hundred and sixty-nine, in the city of Washington, certain buildings and other improvements in the said contract and agreement specified, and at the amount charged in the two first items in the foregoing account; that I did also, at the special request of the said William H. Van Buren, do certain additional and extra work in and about the said premises, and upon the same lots, a true account of which is contained in the foregoing account, and immediately following the *the* two first items thereof; that the said work therein charged was done by me, or by workmen under my direction, for the use of the said Van Buren, and has been paid for by me, and the prices there charged are reasonable prices, and no part thereof is embraced in, or was contemplated by, the said contract, or said additional agreement; that the said work was done on the buildings, fences, and all the improvements erected or put by said Van Buren on said lots; and I claim the full benefit of the act of Congress, entitled "An act to secure to mechanics and others payment for labor done and materials furnished in the erection of buildings in the District of Columbia," passed 2d March, 1833, and a lien upon all the said buildings, fences, and improvements on the said lots, for any balance which may be found due to me, after allowing to said Van Buren whatever sums he may be entitled to credit for on account of said work.

W. H. DIGGES.

Washington, June 26, 1845.

Whereupon, afterwards, to wit, on the 31st day of January, in the year of our Lord one thousand eight hundred and forty-six, the aforesaid plaintiff, by Joseph H. Bradley, esquire, his attorney, prosecuted and sued forth out of the circuit court here, of and upon the account aforesaid, the United States writ of scire facias, directed to the marshal of the District of Columbia, in the words and of the tenor following, to wit:

Sci. fa.

District of Columbia, *to wit:*

The United States of America, to the marshal of the District of Columbia, greeting:

Whereas a certain William H. Digges did, on the 26th June, 1845, file in the clerk's office of the circuit court of the District of Columbia,

for the county of Washington, his certain account or claim against a certain William H. Van Buren, amounting to the sum of five thousand three hundred and seventy-six dollars and eighty-five cents, for work and labor done, and materials furnished and delivered, by the said William H. Digges, to and for the said William H. Van Buren, and used in and about the construction and erection of a certain building on lots No. 11 and 12, in square No. 169, as the said lots and square are marked and laid down on the plat of the city of Washington, in pursuance of the act of Congress of the United States, entitled "An act to secure to mechanics and others payment for labor done and materials furnished in the erection of buildings in the District of Columbia, which said account has been enrolled among the records of said court, as by the record thereof in the office of the clerk of the said court remaining manifestly appears. And whereas the said William H. Digges alleges that the said sum of $5,376 85 is still due to him and unpaid; and whereas judgment still remains to be rendered on the account and record aforesaid, therefore you are hereby commanded that you make known unto the said William H. Van Buren, according to the form and effect of the act of Congress aforesaid, that he be and appear before the circuit court of the District of Columbia, to be held for the county aforesaid, at the city of Washington, on the fourth Monday of March next, to show cause, if any he hath, why the said court ought not to render judgment for the said sum of 5,376 85 upon the record aforesaid, according to the force and effect of the act of Congress aforesaid, and further to do what the said court shall then and there consider concerning him in this behalf; and have you then and there this writ, and make return of the manner in which you shall have executed the same.

Hereof fail not, as you will answer the contrary at your peril.

Witness, W. Cranch, esq., chief judge of said court, the 1st day of December, 1845.

Issued the 31st day of January, 1846.

(Bradley.) W. BRENT, *Clerk*.

And the aforesaid plaintiff, by his attorney aforesaid, on the day of prosecuting and suing forth of the aforesaid writ, declared against the said defendant in the plea aforesaid in form following, to wit: (Nar. copied in page .)

At which mentioned fourth Monday of March, in the year of our Lord one thousand eight hundred and forty-six, and the day of the return of the aforegoing writ, comes again into the circuit court here the aforesaid plaintiff, by his attorney aforesaid; and the marshal of the District of Columbia, to whom the aforesaid writ was in form aforesaid directed, makes return thereof to the court here thereon endorsed, to wit:

Marshal's return.

DISTRICT OF COLUMBIA, *Washington county, to wit:*

By virtue of the within writ, to me directed, I hereby certify, to the honorable the circuit court of the District of Columbia, for the county

of Washington, that, on the twenty-first day of March, in the year of our Lord one thousand eight hundred and forty-six, I made known to the within named William H. Van Buren, that he be and appear before the said circuit court, at the place and on the day within named, to show cause as is within contained, as by the said writ I am commanded, by causing to be set up, on the premises within mentioned, a copy of the said writ.

So answers,

A. HUNTER,
Marshal of the D. C.

Defendant's appearance—Rule plea.

And the said defendant, being called, appears in court here, by Henry May, esquire, his attorney; and thereupon, on motion of the said plaintiff, by his attorney aforesaid, it is ruled by the court here that the said defendant answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, or judgment by the court here will be entered against him in default thereof. And the said defendant, by his attorney aforesaid, defends the force and injury, when, and so forth, and prays leave of the court here to imparle until the third Monday of October next, and then to answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, and to him it is granted; the same day is given to the said plaintiff also.

October term, 1846.—*Plea of non assumpsit.—Issue joined.—Venire facias.*

At which said third Monday of October, in the year of our Lord one thousand eight hundred and forty-six, to which said day the said defendant had leave to imparle, and then to answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, comes again into the circuit court here as well the said plaintiff, by his attorney aforesaid, as the said defendant, by his attorney aforesaid; and the said defendant, by his attorney aforesaid, as before, defends the force and injury, when, and so forth, and saith, that he did not assume upon himself in manner and form as the aforesaid plaintiff above against him hath declared, and of this he puts himself upon the country; and the said plaintiff, by his attorney aforesaid, in like manner, and so forth. Therefore, let a jury thereon appear before the court here on the fourth Monday of March next, by whom, and so forth, and who neither, and so forth, to recognise, and so forth, because as well, and so forth; the same day is given to the aforesaid parties then and there, and so forth.

And now at this day, to wit, the said fourth *fourth* Monday of March, in the year of our Lord one thousand eight hundred and forty-seven, comes again into the circuit court here, as well the said plaintiff, by his attorney aforesaid, as the said defendant, by his attorney aforesaid.

Jury.—Verdict.—Judgment.—Damages.

Whereupon, for trying the issue aforesaid, it is ordered by the court here that twelve persons, from the panel of petit jurors returned to the

court here by the marshal of the District of Columbia, be called, who, being called, come, to wit:

1. Jabez B. Rooker,
2. Henry T. Weightman,
3. Wm. Brown,
4. Philip Ennis,
5. George Oyster,
6. Washington Lewis,
7. Richard Wimsatt,
8. Samuel Stettinius,
9. Robert Brooke,
10. Orris S. Payne,
11. Gabriel Barnhill,
12. Francis A. Tucker,

who, being empannelled and sworn to say the truth in the premises, upon their oath do say, that the said defendant did assume upon himself in manner and form as the aforesaid plaintiff within against him hath declared; and they assess the damages of the said plaintiff, sustained by occasion of the non-performance of the promise and assumption aforesaid, to the sum of one thousand two hundred and twenty-three dollars and twenty-one cents, current money, with interest from the twenty-first day of August, eighteen hundred and forty-five, until paid. Therefore, it is considered by the court here that the aforesaid plaintiff recover against the said defendant, as well the said sum of one thousand two hundred and twenty-three dollars and twenty-one cents, current money, with interest from the twenty-first day of August, eighteen hundred and forty-five, 'til paid, his damages aforesaid, by the jurors aforesaid, in form aforesaid assessed, to be sustained by occasion of the non-performance of the promise and assumption aforesaid, as the sum of two dollars and forty-four cents, by the court here unto him, the said plaintiff, on his assent, adjudged for his costs and charges by him about his suit in that behalf laid out and expended. And the said defendant in mercy, &c.

Memorandum.—Mem.

Before the jurors aforesaid retired from the bar of the court here, the said defendant, by his attorney aforesaid, filed in court here the following bills of exceptions, to wit:

Defendant's 1st exception.—1st exception.

DIGGES, use of Libbey,
vs.
VAN BUREN.

The plaintiff, in support of the issue joined upon the plea of non-assumpsit, produced and proved written contracts between the parties, as follows: (copied in pages) and further offered evidence tending to prove that he had executed the work therein stipulated for, and had delivered it to the defendant, who received it without objection. And thereupon the defendant offered to prove, by competent witnesses, that, before receiving the said work, and during the progress thereof, he had objected to the sufficiency of various parts of the same as a compliance with the contract, and had communicated said objections to the plaintiff, and that there were various omissions of work stipulated to be done, and various portions of the work contracted for

were done in a defective and inferior manner, and not as well as contracted for by the plaintiff, and that some of these defects were not and could not be discovered by the defendant until after the defendant had entered into the possession and use of the house; and the defendant offered to prove, by way of set-off, and having filed a bill of particulars of said alleged omissions and defects, and given due notice thereof to the plaintiff of the same, and of his purpose in reduction of the contract price of the whole work sued for by the plaintiff, the value of said omissions, and the difference in value between the actual work defectively executed and that contracted for; to which evidence so offered, or any of it, the plaintiff objected as inadmissible under the issue; and the court, on the objection of the plaintiff so taken, refused to admit any of said evidence for said purpose; to which refusal the defendant excepts, and tenders to the court this his bill of exceptions, which is thereupon signed and sealed, this 14th day of April, 1847.

W. CRANCH, [L. S.]
JAMES S. MORSELL. [L. S.]

Defendant's 2d exception.—2d exception.

In addition to the evidence contained in the aforegoing bills of exception on the part of defendant, and which are made a part hereof, the defendant, for the purpose of informing the court as to the relation and situation of the said defendant in regard to the said house, and the plan and building thereof, and the said plaintiff, at the time of the execution of the contract aforesaid, and the circumstances surrounding the parties, and leading and inducing to the said contract, and for the purpose of informing offered evidence by T. P. Andrews, a competent witness, and who was present at the execution of said contract, and signed the same as a witness, tending to prove that the said defendant intended to reside in the said house with his family as their permanent home; that the site of the same was selected by him on account of its great convenience to be a place of business; that the plan thereof was, in many respects, peculiar and according to his own plan, and intended for his own convenience and professional habits; and that the amount of 10 per cent. on the contract price, stipulated by the contract aforesaid to be forfeited if the said house was not entirely finished and fit to occupy, as therein provided, on the 25th December, 1844, was intended by the said parties, at the time of entering into said contract, as and for the liquidated damages that would result and fairly belong to the said defendant by reason of said failure to finish the said house on the 25th December, 1844; to which said offered evidence, and every part thereof, the *the* plaintiff objected, and the court refused to hear the same; to which refusal of the court the defendant, by his counsel, excepts, and prays the court to sign, seal, and enrol this his bill of exception, which is accordingly done, this 15th day of April, 1847. W. CRANCH, [L. S.]
JAMES S. MORSELL, [L. S.]
JAMES DUNLOP. [L. S.]

Defendant's third exception—3d exception.

Upon the further trial of this cause, and in addition to the evidence contained in the aforegoing bills of exception, the plaintiff having given evidence tending to shew that the said defendant, while the said house was being built, made a contract for an alteration in the style and finish of the *plaistering* of the said house, which contract was made with a third person, and not with the plaintiff, and thereby the execution of the work on the said building was delayed beyond the said 25th December, 1844; the defendant offered evidence tending to prove that the said *plaistering*, and the style and finish thereof, was usual and proper and necessary to the completion of the said house; and further offered to prove, that at the time of the execution of the said *plaistering* the defendant, in the presence of the plaintiff, insisted on and required him to execute the same as a part of his contract, and that he refused so to do. To the admissibility of which said offered evidence, and every part of it, the plaintiff objected, and the court refused to permit the same or any part thereof to go to the jury; to which refusal the defendant excepts, and prays the court to sign, seal, and enrol this his exception, which is accordingly done this 15th day of April, 1847.

W. CRANCH, [SEAL.]
JAS. S. MORSELL. [SEAL.]

Defendant's fourth exception.

On the further trial of this cause, and after the evidence contained in the foregoing bills of exceptions, and which are made a part hereof, the defendant offered evidence tending to prove that he had paid, laid out, and expended various sums of money to various persons other than the plaintiff, for and on account of the *ommissions* and deficiencies in the work and materials done and furnished by the plaintiff, and omitted to be done and furnished by him under his said contract; and offered to prove, in connexion therewith, that such omissions and deficiencies were in and about the work and materials furnished and done by the plaintiff under his said contract; but the said plaintiff objected to the admissibility of the said offered evidence and every part thereof, and the court refused to allow the same or any part thereof to go to the jury; to which refusal of the court the defendant excepts, and prays the court to sign, seal, and enrol this his exception, which is accordingly done this 15th day of April, 1847.

W. CRANCH, [SEAL.]
JAS. S. MORSELL. [SEAL.]
[SEAL.]

Defendant's fifth exception.

Upon the further trial of this cause, the plaintiff having given evidence in addition to that contained in the aforegoing bills of exception, and which are made a part hereof, tending to prove that he had at the request of defendant, in addition to the work and labor and materials

provided for in the said contract, done and performed certain extra work, and furnished extra materials on and about the said house and premises, and for which he claimed extra compensation and damages over and above the amount specified in the said contract, and the defendant having offered evidence tending to prove that he did not consent to any extension of the time for completing the said house as provided by the said contract, prayed the court to instruct the jury, that if, from the whole evidence aforesaid, the jury shall believe that any extra work ordered or sanctioned by defendant beyond that provided for by the written agreements, did not entitle the plaintiff to any extension of time in the completion of said work, unless the jury shall find that at the time of agreeing for said work it was distinctly understood that extra time should be allowed in consequence, and then only to the extent of the time actually agreed upon, or in the absence of any agreement for a precise time to such extent as was reasonably necessary for such extra work; which instruction the court gives, and on the prayer of the plaintiff adds thereto: But the court further instructs the jury that the defendant is not entitled to set off in this action the sum of ten per cent. on the amount of the contract mentioned in the proviso in the said contract, nor any damages which may have resulted to the defendant by any delay on the part of the plaintiff in completing the said house, and delivering the same to the defendant on the said 25th day of December, 1844. To which modification of the court and instruction on the part of the plaintiff, as above granted, the defendant excepts, and prays the court to sign, seal, and enrol this his bill of exceptions, which is accordingly done this 15th day of April, 1847.

W. CRANCH, [SEAL.]
JAS. DUNLOP. [SEAL.]
[SEAL.]

6th exception.—*Def'ts 6th exception.*

And the said plaintiff, having further given evidence tending to shew that, after the plaistering of the said house had been begun, the defendant entered into a contract with the plaisterer to make cornice and centre pieces for the parlors and passage, that a delay in the work for a week was occasioned by the negotiation leading to the said agreement, and a further delay of two weeks was occasioned by the work required on the said additional plaistering, and part of the same being frozen in so much that the said plasterer did not and could not finish the said work until some days after the said 25th December, 1844, and much of the carpenter's work, and the painters, were thereby postponed and delayed until after the said day; the said defendant then gave evidence to shew that the plaintiff knew of the said agreement for the said additional plaistering, and did not object thereto.

And thereupon the defendant prayed the court to instruct the jury: If the jury shall find, from the evidence, that any delay was caused in completing the work in consequence of the extra plaistering in the par-

lors and passage, done under the distinct contract between the defendant and Messrs. Brown, given in evidence, and they shall further find that said extra plaistering was so done with the full knowledge and sanction of the plaintiff, and without any understanding between him and the defendant at the time, that in consequence thereof a further time should be allowed for completing the building, then the plaintiff is not entitled to any further time for completing the building because of such work and the delay attending the same.

That the forfeiture of 10 per cent. in the contract price of the work for a failure to complete the same by the 25th December, as stipulated in the written contract given in evidence, is to be held as the liquidated amount of damage for the failure to complete the work in that time, and the defendant is entitled to a deduction of the full amount thereof from the specified price of the work, unless the jury shall find that the failure to complete the same by said date proceeded wholly from the acts or default of the defendant, so that, independently of such acts or default, he would have so completed it within said time.

Which instructions and each of them the court refused to give; to which refusal of the court the defendant excepts, and prays the court to sign and seal this his bill of exceptions; which is done accordingly, this 15th of April, 1827.

W. CRANCH, [SEAL.]
JAMES S. MORSELL, [SEAL.]
JAS. DUNLOP. [SEAL.]

7th exception.—*Def'ts 7th exception.*

If the jury shall find, from the evidence aforesaid, that the plaintiff contracted with the defendant, in writing, to build, complete, and deliver the said house to him on or before the 25th December, 1844, and that the plaintiff failed so to do, and shall further find that the time for said completion and delivery was not extended beyond the said 25th December, 1844, by the agreement of the said plaintiff and defendant, or by the act of the defendant, then the plaintiff is not entitled to recover in this action.

Which the court refused to give; to which refusal the defendant prays leave to except, and that the court will sign and seal this his bill of exceptions; which is accordingly done, this 15th April, 1847.

W. CRANCH, [SEAL.]
JAMES S. MORSELL. [SEAL.]

8th exception.—*Def'ts 8th exception.*

If the jury find, from the evidence aforesaid, that the plaintiff contracted, by the contract of the day of aforesaid, and the additional agreement thereto of the day as aforesaid, to build, complete, and deliver to the defendant the said house on or before the 25th December, 1844, and that the plaintiff failed so to do, then the defendant is entitled to claim 10 per cent. as a deduction on the whole

amount of the contract price from the claim of the plaintiff; provided the jury shall find, from the evidence, that the plaintiff could reasonably have so completed and delivered the said house on the 25th December aforesaid, and notwithstanding the jury may further find that the building and completion thereof was delayed by the act of the defendant.

Which instruction the court refused to give; to which refusal the defendant excepts, and this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 15th of April, 1847.

W. CRANCH, [SEAL.]
JAS. S. MORSELL, [SEAL.]
JAS. DUNLOP. [SEAL.]

9th exception.—*Def'ts 9th exception.*

If the jury find, from the evidence, that the plaintiff contracted with the defendant to build, complete, and deliver to him the said house on the 25th December, 1844, and failed so to do, then the defendant is entitled to claim 10 per cent. on the amount of the whole price of the contract as a deduction from the plaintiff's claim.

If the jury shall find, from the evidence, that the plaintiff contracted with the defendant, in writing, to build, complete, finish, and deliver to him the said house on or before the said 25th December, 1844, and shall further find that the said plaintiff failed so to do, and that the time for said completion and delivery was not extended by agreement of the parties beyond the said 25th December, 1844, then the plaintiff is not entitled to recover in this action.

Which instruction the court refused to give. Whereupon the defendant, by his counsel, excepted to said refusal, and prayed the court here to sign and seal this his bill of exceptions; which is accordingly done, this 15th April, 1847.

W. CRANCH, [SEAL.]
JAS. S. MORSELL, [SEAL.]
JAS. DUNLOP. [SEAL.]

Contract referred to in def'ts 1st bill of exceptions.

It is hereby agreed, between William Digges, of the city of Washington, carpenter, of the one part, and W. H. Van Buren, M. D., of the other part, as follows:

First. The said William Digges agrees to build, or cause to be built, for the said W. H. Van Buren, a house, with office, back buildings, woodhouse, stable, and privies, in the style and of the materials set forth in the following specifications, and represented in the accompanying plan, to wit:

The front of main building, on G st. west, city of Washington, to be 28 feet, of pressed brick.

Front of office, on G st., 21 ft.

Depth of main building, on 18th st., 36.3.

House to be built of two stories, with attic chambers above, of first rate

materials throughout, including office and back buildings, and in the best and most modern style of workmanship; and to be entirely finished and fit for immediate occupation on or before the 15th day of December, 1844.

For the brick work, throughout, the best hard burned red brick are to be employed, with sharp river sand and best lime.

For the flooring, throughout, the best quality narrow N. C. yellow heart pine, tongued, grooved, and secret nailed.

Roofs to be slated in the best manner.

Spouting to be thoroughly arranged in the least conspicuous manner, so as to carry off all the water that falls on the roofs of the main building, office, and back buildings.

Door and window frames and doors to be of perfectly seasoned material, warranted not to warp or shrink.

Mortise locks on the parlor and office doors, and on the bed rooms of the second story main building to be set into the door frame, with knobs of china or composition; also, the door between the main entry and passage to back building, and the vestibule door; all the other doors to be provided with carpenters' or the cottage lock, as shall be agreed upon by both parties.

All the window shutters to be provided with springs and catches, with the latest improvemens; window shutters front door to be double, with mortise locks, plated knobs and bolts, single panel in each door, with beading or moulding around panels, as agreed upon.

Parlor and office and main entry doors to have each two panels and two rails, pilasters, and architraves plain, neat, and in modern style.

Level of surface of parlor, office, and main entry floors to be 3 feet above level of pavement.

Cellars to be dug under parlors, with two cellar windows on G street, with iron bars, and provided with glazed sashes secured by bolts in wooden frames, so that they can be taken out, if required, and one window on 18th street, same as the others, except that, instead of bars, an iron grate on hinges with bolt and padlock to be substituted; floor of cellars to be levelled, pitch of cellar 5 f. 6 in. to 6 f. clear of joists; foundation to be puddled, if required.

Steps to front and front office door to be same style as those of H. Gettis's house, with the addition of a centre iron stay under each slab.

Front doors to be finished with white marble pilasters, architraves and cap, according to pattern agreed upon.

Front windows to have white marble sills and heads.

Glass in first story, Boston crown; on second story, 12 x 18; windows to be hung so as to let down from the top in main building, office, and dining room.

Mantel pieces in parlors of marble, the best to be obtained for $40 each; those of office, dining room, bed rooms, main building, also of marble, not to cost more than $30 each, and of patterns to be agreed upon.

Plan and pitch of second story same as first, except that the main en-

try is to be widened alongside of first bed room, 1 foot (clear) and a stud partition run across 12 feet (clear) from front wall, enclosing a room 8 x 12 (clear) with a door 3 f. 2 in. on entry, and another of same size into front bed room, and the room over the kitchen, in back building to be unequally divided to the best advantage, into two bed rooms for servants; ascent and position of staircase to be determined by builder, from kitchen to rooms above it. Garrets of main building to have 5 feet pitch on eaves, and 8 feet at peak; garret room on passage, as in second story, to be provided with shelves and drawers for a linen closet, with 3 feet door and carpenter lock; attic stories to have 3 windows front and rear, in deep cornices.

All the wood work throughout the house, back buildings, &c., to be painted with three coats of white paint in the best manner, except the wood work in the dining room and office which is to be painted in imitations of oak; walls to be smooth finished with plaster of Paris, fit for painting; walls to be plastered to floors before surbaces are put on; outside walls of main building to be 14 inches thick throughout; walls of office and back buildings, 9 inches thick; wall to be continued from rear of wood houses to foot of lot, and in rear of lot to stable, 5 f. 6 in. to 6 f. in height.

A neat wooden paling to be run across lot 24 feet from foot wall, to divide stable yard from house yard 3 f. 6 in. high, with single gate in centre, to be painted white, with green tops.

Dimensions, front door 5 f. wide, main entry 7 f. wide, (clear,) vestibule 6 x 7 clear, door 4 f. wide, main staircase 3 f. 4 in. wide; back entry door 3 f. 6 in. wide, stairs to cellar beneath main stairway with door 2 f. 9 in.

Front parlor, width 17 f. 11 in. clear, depth 16 f. 11½ in. clear, pitch 12 f., sliding doors 8 f. 8 in., other doors 3 f. 2. in., windows 3 f. 8 in. x 7, width of chimney stack 6 f. 11 in., width of recesses, each 5 f., marble hearths.

Back parlor, same as front, except one venitian widow 5 x 7.

Office, front wall of office to be carried up square so as to conceal its roof, and to be capped; roof to slant towards the east, width 15 f. 9 in. clear, depth 17 f. 4½ in., pitch 12 f., front windows wide, back windows 5 feet, doors 3 f. 2 in., stud partition between office and passage 6 in., width of passage 4 f. clear, window in passage 3 f. 2 in., front door 3 f. 2 in., back door 2 f. 9 in.; fire place ordinary size for wood, with chimney boards; permanent book case in recess, with glazed doors, with diamond lights above, and common small closet doors below, to fill up width of recess entirely, opposite to this a closet of similar dimensions to finish with shelves, and four drawers below; locks to closets and drawers, wardrobe common dimensions in S. E. corner, all of common materials seasoned, and to be painted imitations of oak; covered piazza in rear of office, white pine 6 x 2 f. 1 in.; passage between main and back building, including back stairway with pantry beneath it 9 f. 5 in., width of stairway 2 f. 9 in., width of door to stairs 2 f. 9 in. or 2 f. 6 in., pantry door same; pantry to be furnished with

shelves against the walls in the direction of its length, width of passage exclusive of stairs 6 f. 5 in., width of door to dining room 3 f. 2 in. x 6 f. 10 in., door leading into yard, venitian, 4 f. 4 in., with transom lights, and shutters on the inside to side windows, with bolts.

Dining room, 15 f. 11 in. wide x 16 f. deep in the clear, pitch 10 f., windows 3 x 6, glass 10 x 17, door to kitchen to be as heavy as parlor doors, thick, and of particularly well seasoned stuff 3 f. x 6 f. 8 in., closet in recess on left of chimney stack, filling up depth of recess, and running from floor to ceiling, door two panels and two rails with good lock, and partition of wood with panel same as door, one large shelf 2 f. 6 in. from floor, and same depth as closet, of 1¼ in. stuff, and shelves above to ceiling 18 inches apart on back and ends of closet, well supported, closet in N. E. corner of room 2 f. deep by 5 f. wide, and finished in same manner.

Kitchen, 15 f. 11 in. wide by 15 f. deep, windows 2 f. 9 in. wide, stairs to second story 2 f. wide, board partition, with closet below and cupboard above, position descending on position of stairs, to be determined hereafter; closet in recess on right of chimney, stack with shelves outer door 3 f., in rear of kitchen a covered porch descending to the pavement of the yard, and continued as a covered passage to wood house door, with closet in corner as represented in plan.

Wood house, 9 f. x 14 in. clear, door at each end 2 f. 6 in. wide, door on stable yard with wooden lock and iron bolt on inside, pitch 8 f., with the requisite slope.

Privy, of brick 9 f. x 4 f. 6 in. clear, divided into two compartments by stud partitions; outer apartment 6 f. x 4 f. 6 in. clear, inner 2 f. 6 in. x 4 f. 6 in., with one seat; outer compartment to have two large seats, and one small one, plaistered on the inside, and seats painted white; lids to seats, door to each compartment, 2 f. 6 in. x 6 f. 8 in., pitch 7 f., slope towards front to be surrounded by a rough latticed frame, 3 f. from outer wall, with an opening on path of 3 f. and 8 f. high.

Stable and carriage house, outside measurement, 12 f. 9 in. x 24 f. 9 in., walls 9 in., slope of roof towards front of lot, stable door 3 f. x 7 f., with a wooden lock, inner stall 5½ f. x 8 f., outer stall 5½ f. x 8 f., with manger, iron ring, and staple in each rack's in. corner, with sound rails, passage in rear of stalls 4 f. wide; rough board partition between stable and carriage house, with wooden pins for harness 18 in. apart and 6 f. from ground floor, on both sides; window on passage in rear of inner stall 2 f. 6 in. x 3 f. 6 in., with wooden shutter and iron bolt; fodder trough beneath window; opening into hay loft with ladder in N. E. corner at end of passage; stable 12 f. x 11 f. in the clear, stalls to run north and south, heading to the south, the plan in this respect being departed from.

Carriage house 12 f. x 13 f. in the clear, window same as stable, grain binns below window as represented * * * *. Double door on west end 8 f. 6 in. wide x 9 f. high; opening into stable 2 f. 6 in.

Hay loft 12 f. x 24 f., pitch 9 f. at ridge; floor tongued and grooved;

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window 2 f. 6 in. x 3 f. over carriage door; gate to stable yard 8 f. 6 in., with freestone jams.

Second. That the said W. H. Van Buren is to pay to said William Digges for the house built and finished as above specified, the sum of four thousand and six hundred dollars in gold or silver current money of the United States, or its equivalent in bank notes in the following manner, viz: $1,000 on the first day of September, $1,000 on the first of October, $1,000 on the first of November, and $1,600 on the day that the house is entirely finished and fit to occupy; provided that it shall not be later than the 25th December, 1844; he, William Digges, to forfeit 10 per cent. on the whole amount if said house is not entirely completed and fit to occupy at the time agreed upon, viz., December 25th, 1844.

If there should be any matters of detail or finish, or matters not specified properly, and usually attached to or necessary to the completion of a house such as the one above specified, such things are to be considered as included in this agreement.

If any disagreement should occur between the parties in this agreement with regard to matters above specified, such disagreement shall be settled finally, and without appeal, by three persons, one of whom to be selected by each of the parties, and the third chosen by the persons thus selected, and, if necessary, by lot.

In witness whereof the said parties have hereunto set their hands and seals this seventh day of August, in the year of our Lord eighteen hundred and fourty-four.

W. H. DIGGES,
WM. H. VAN BUREN.

Signed and sealed in presence of—
TH. LAWSON,
T. P. ANDREWS.

An additional agreement.

The undersigned hereby agree to the alterations of, and additions to, the above contract mentioned below; and also that this additional agreement shall in no respect invalidate the above contract, except in the specifications herein contained, to wit: that in place of "the attic story with rooms," &c., &c., as specified in the above contract, W. H. Digges is to build a third story, divided and finished in all respects like the second story, as specified above, except that the ceiling shall have 9 feet pitch in the clear, and that there shall be a window on the stairway in the back wall, and a window on the gable end of the main building on the passage, each of the same size as the other windows of the story, and all to be double hung; and also a garret, floored, plastered, and divided as agreed upon, with the necessary stairways, in the best manner, and with the same material employed in the second story. The passage in the garret to have a semi-circular window, with a base of equal width with the windows of third story, and made to slide into a frame in the

wall, and each garret room to have a window on the east gable, except the small room on the passage, which is to be fitted up as a closet, with shelves and drawers, as specified for the corresponding room in the "attic story" of the original agreement.

And also, that for the third story and garrets as herein specified, W. H. Van Buren is to pay to W. H. Digges the sum of five hundred and twenty-five ($525) dollars, when they shall be completed, in addition to all other payments already provided for. "Pitch of 2d story to be reduced to 11 feet in the clear."

Signed this 1st day of September, 1844.

WM. H. VAN BUREN,
W. H. DIGGES.

In presence of—
A. BALMAIN,
TH. LAWSON.

WM. H. DIGGES
vs.
W. H. VAN BUREN. } Notice of set-off.

Take notice that the above named defendant, on the trial of this cause will give in evidence, and insist, that the above plaintiff, before and at the trial of the commencement of this suit, was and still is indebted to the said defendant in the sum of seven hundred and seven dollars for divers materials and other necessary things made, done, furnished, used, and applied in and about a certain building that the plaintiff had undertaken and contracted to build for the defendant, at the county of Washington, in the District of Columbia, and which said materials and things were so used, applied, done, and finished on account of, and in behalf of, at the special instance and request of, the plaintiff; and also in the sum of seven hundred and seven dollars for money by the defendant before that time paid, laid out, and expended for the plaintiff by the defendant, on account of and on the behalf of, the said plaintiff, under his contract as aforesaid, and by his special instance and request; and that the said defendant will set off and allow to the said plaintiff on the said trial so much of the said several sums of seven hundred and seven dollars, so due and owing from the said plaintiff to the said defendant, against any demand of the said plaintiff, to be proved on the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided.

Dated this day of April, 1847.

H. MAY, *Deft. attorney.*

To Wm. H. Digges, present.

MEMO.—A particular account of the above set-off is hereto annexed.

H. MAY, *Plfts. attorney.*

Wm. H. Digges to W. H. Van Buren, Dr., to amounts paid.

Nov. 5, '44. Charles E. Craig, for painting and pencilling front of house - - - $40 00

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Dec. 23, '44.	R. J. & W. Brown for cornicing parlors and vestibule, and centre pieces with hooks, &c.	75 90
Dec. 24, '44.	Do. for plastering house - -	30 00
1845.		
Jan. 4.	P. L. Coltman, for paving, &c. - - -	109 85
Feb. 5.	Thos. Curtes, for bricks and digging, &c. - -	40 00
"	R. O. Knowles, for fencing walls, &c. - -	44 55
Mar. 10.	Thos. Curtes, for digging and curbing, &c. -	26 26
" 27.	Lewis H. Schneider, for hanging bells, &c. -	57 63
Apr. 3.	Thos. Curtes, for screws, gravel, bricks, &c. -	22 21
" 30.	F. H. Darnell, for painting - - -	15 00
May 2.	S. W. Wheeler, for shelves, and repairs and jobbing	13 25
" 3.	F. & A. Schneider, for kitchen crane, rings to manger - - - - - - -	4 87
" 9.	Do. for 4 night latches and putting on same	5 50
" 10.	Taylor, for paving, repairing gate piers, and pointing walls - - - - - - -	28 17
" 12.	Hughes, for sodding and work about yard - -	41 50
" 27.	Hervey Emmert, to repairs to spouting - -	13 87
July 2.	C. L. Coltman, for paving stable yard - -	57 98
" 2.	R. O. Knowles, for closets in chambers, and repairs	58 75
Sept.	Bessy, for steps, &c. - - - -	24 00
	Sundry amts. paid for repairs and jobbing - -	38 75
To amount paid for rent of house occupied by defendant from 25 Dec., 1844, to 16 April, 1845 - - - -		155 16

Appeal to Supreme Court.

And whereas afterwards, to wit, on the sixth day of April, in the year of our Lord one thousand eight hundred and forty-nine, the said defendant, by his attorney aforesaid, produced and filed in court here the United States writ for the correction of errors of and upon the judgment aforesaid, directed to the judges of the circuit court of the District of Columbia, in the county of Washington, and in pursuance thereof, and according to the form and effect of the law in such case made and provided, a transcript of the record of proceedings of the judgment aforesaid, and all things thereunto relating, with the writ of error aforesaid, and a copy of the appeal bond hereunto annexed, is transmitted to the said Supreme Court accordingly.

Certificate of clerk.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, this 18th day of September, 1849.

[SEAL.]

JNO. A. SMITH, *Clerk*.